HAWAIIAN GAZETTE
AN INDEPENDENT JOURNAL,
DEVOTED TO HAWAIIAN PROGRESS.

Supreme Court of the Hawaiian Islands.—In Probate.

BEFORE MR. JUSTICE JUDD AT CHAMBERS.

IN RE PETITION FOR PROOF OF WILL OF HER ROYAL HIGHNESS KEKAULUOHI, PREMIER, DECEASED.

Decision.

This is an application by H. H. Chas. Kanaina, for the probate of the will of Her late Highness M. Kekauluohi, Premier, alleging that said will was destroyed after her death, and praying that it be established upon proof of its contents. It is proved that Her Highness died on the 7th of June 1845, that she left an only son William Charles Lunalilo, who became King in 1873, and who died in 1874, devising his property to the petitioner, his father. The following is the will sought to be established as propounded in the petition:

1.—I bequeath all the estate, formerly of Kaikioewa to Moses, son of Kinau and Kekuanaoa.

2.—I bequeath all the estate formerly of Hoapilikane, to Lot, son of Kinau and Kekuanaoa.

3.—The estate of Kinau is to go to Victoria Kamamalu, the daughter of Kinau and Kekuanaoa.

4.—I bequeath all my own estate held in my own right to my own son Lunalilo.

5.—That if Moses or Lot should die before Victoria Kamamalu, then she shall inherit their property.

6.—That if Lunalilo should die first, then the children of Kinau shall inherit his property.

7.—That if Moses, Lot and Victoria Kamamalu, should die before Lunalilo, then he shall inherit all their property hereby bequeathed.

8.—That Alexander Liholiho, son of Kinau and Kekuanaoa was to take nothing as he was to inherit the throne.

Four witnesses have been examined to establish this will, viz.:—Auwai, Kilinahe, Kamaipuupaa (w) and S. M. Kamakau, the three former claim to have been present at its execution; but before considering their testimony, it is necessary to examine the principles of law applicable to the proof of lost wills.

It is laid down by Swinburne and adopted by later text writers "that if a testament be made in writing, and afterwards lost by some casualty, if there be two unexceptionable witnesses who did see and read the instrument written, and do remember the contents thereof, the two witnesses so deposing to the tenor of the will, are sufficient for the proof thereof in form of law," and

In 1, Williams on Executors, page 312, the following comment is made:—"And, at this day, it is quite clear that the contents or substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him, for example, either by showing that the instrument existed after the testator's death, or that it was destroyed in his lifetime without his privity or consent."

The following is the note to Redfield on the law of wills, p. 348. "The practice of the American courts, of receiving parol evidence of the contents of a lost will, seems to be universal, and without question, notwithstanding the stringent statute requirements in regard to the mode of executing wills, and a lost will may be established by the testimony of a single witness, notwithstanding the statute requires the execution in the presence of two or more. But this evidence must come from witnesses who have read the will and whose recollection of its contents is trustworthy."

In Davis et al., vs. Sigourney, 8 Met. 489, Wilde J. says:—"To authorize the probate of a lost will by parol proof of its contents, depending upon the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act on probabilities." In this case the witness was the Attorney who drafted the will, but as he could not testify with absolute certainty as to some parts of it, the Court refused to establish it.

None of the witnesses produced in this case at bar, ever read the will. Auwai says he heard the King read it before signing it; Kilinahe says Kulawailehua read it, and he also says that the King read it; and S. M. Kamakau says that he heard it read in the Legislative Council after the Premier's death; Kamaipuupaa says she heard it read in the presence of the testator. A strict ruling would fully justify the refusal of the probate of the will on the ground suggested, that is, that no one witness testifies from actual recollection of its contents; but from recollection of what was said to be its contents by the reader. The fact, however, that the King was the reader as testified to by one witness, would repel the possibility of a motive for a false reading of it to the testator, (herself the highest chief then living,) and it having an important bearing as a State document, and I, therefore, in view of the peculiar circumstances of this case, do not rule that the witnesses must have actually read this will, in order to be allowed to testify as to its contents.

Let us see, however, if the evidence bears the test of being "strong, positive, and free from all doubt."

Auwai says the will was made one month before Kekauluohi died, and that it was signed three or four days before her death in the presence of the King, John Young, and the young chiefs who were sent for from school, and that Kamehameha III. and John Young then signed it.

Kilinahe says the young chiefs were not present, and that the King and Mr. Young signed it a few days after the testator signed it, and that she died a few weeks after signing it; Auwai, Kilinahe, and Kamakau agree that the will left the property of Kaikioewa to Moses, the property of Hoapilikane to Lot, and her own property to her son Lunalilo; Auwai and Kilinahe agree that the will left the property of Kinau to Victoria, and Kamakau says that it left the estate of her own family to Victoria and Lunalilo, that is that Lunalilo and Victoria were to divide the family (or Kinau) property equally, but that her own property was to go to her own son. Auwai says that the will directed as follows:—"Regarding Moses, Lot and Victoria, if either of them die the others were to inherit, and if Lunalilo died first they were to inherit." He adds that when Kamehameha III. came in, "Kekauluohi told him, that if Moses, Lot and Victoria died, then Lunalilo was to inherit," but he does not assert that the will contained these words.

Kilinahe says the will provided that if either Moses, Lot or Victoria died, then each would inherit from the other; if they all died before Lunalilo he would inherit all; if Lunalilo died first, they would inherit.

Kamakau says that if any one (of the four) died, the others would inherit. If all but one died he would inherit.

The above statements of the recollection of the different witnesses vary so essentially from each other, that I am at a loss to say what were the actual terms of the will and I do not feel at liberty to call out the testimony where it happens to coincide, and from these fragments frame a will. Using the caution which Courts are bound to exercise in such cases, I cannot act upon the probability that the recollection of Kilinahe and Auwai, servants of the family, are any more likely to be more trustworthy than that of Kamakau the Historian whose learning is certainly greater than that of the other two.

Here I must allude to the testimony of Kamaipuupaa who while present at the signing in the presence of the King, states that the will left the property of the testator to her son Lunalilo and that he was the only one mentioned in her will, and that she did not hear any other property mentioned.

Over thirty years have elapsed since the alleged transaction; every one of the parties mentioned and interested in the will propounded have passed away from earth. As a matter of fact the Land Commission, which was organized the same year, (1845) did award to Moses, the lands of Kaikioewa, to Lot, the lands of Hoapilikane, to Victoria, the lands of Kinau, and to Lunalilo the lands of Kekauluohi; and they were awarded by distinct titles to the different individuals and "their heirs and assigns," and with no limitation over to the survivor or survivors, as sought to be established by the will. Such a limitation of entailing of these vast estates would be inconsistent with the right of alienation, a right, however, freely enjoyed by all of the above named young chiefs or their guardians, without objection by the others or their survivors.

It may be objected to, however, that this is a proceeding merely to admit a will to probate, not to determine the right of property under it, but I consider the *restrictions* and *terms* of a will as fair matter of comment upon the question of the proof of a lost will, for if they are absurd in themselves, it is a fair inference that they were not in the will. For instance, further, the right assumed by the testator, as claimed in the will propounded, to devise as her own, the property confessedly another's, as the property of Kaikioewa to Lot, is certainly absurd when it is claimed to have any testamentary effect.

Reference, however, to Hawaiian history will show us that such "kauohas" or directions made by a High chief in the expectation of death were highly regarded, and as to the nature of advice, which were given effect according as the King after discussion with the chiefs, considered the instructions to be reasonable, and such a "kauoha" was equally regarded whether purely oral or reduced to writing.

This leads me to a point made by the counsel for the contestant, that is, that if it be admitted that the contents of the will are shown, this will has been already proved by a court of competent jurisdiction, as it was presented to the Legislative Council in 1845, and as testified to by Kamakau "its provisions were carried out" which corresponds to what is now known as admitting a will to probate.

The law on the subject was the act of 24th of April, 1841, "Respecting parental duties." "When he (the parent) dies, the heir shall exhibit the will to the King, and if the Supreme Judges perceive there was a real fault in the will they shall correct it," &c.

The Supreme Judges were, by the constitution of October 8th, 1840, the King, the Premier, and four persons chosen by the Representatives, but I find that in 1845, M. Kekuanaoa, then Governor of Oahu, and Judge of the Court of Oahu, admitted wills to probate. (Vide Polynesian, 1845, proof of will of Thomas Pratt.)

It is my opinion that this kauoha of Kekauluohi was not regarded as having any effect as a testament, except so far as it left her own property to Lunalilo and it was unnecessary for this purpose, for she had but one son and heir, Lunalilo, and it could have no effect, other than as good advice, in passing the lands of Kinau to Victoria, or those of Hoapilikane to Lot, &c.

It was not "strictly admitted to probate," in the Legislative Council of chiefs as contended for, but it was discussed there, and carried into effect so far as was deemed advisable, that is, the sentiment prevailed that the young chiefs mentioned should inherit the lands from their respective parents and foster parents as indicated.

In one sense, however, it was admitted to probate, for the only judicial action necessary to be taken upon it was taken, and I fail to find anything in the whole transaction that bears out the idea that this kauoha had the *entailing* clauses in it, as propounded in the petition, but if it did contain them, the King and council set them aside, for these were never carried out.

That the Legislative Council did settle or take action upon the property of high chiefs is clear, for the "Elele Hawaii," newspaper of June 3rd, 1845, contains a notice of the settlement by the Legislature of the property of Gov. John Adams, (Kuakini) by which they determined that his private property should go to his heir Leleiohoku, in accordance with his kauoha (will) and that his cash $20,000 should go to Kekauluohi, Kamehameha III., and the young chiefs, Liholiho, Lot, Moses and Victoria. Also notice of the settlement of the property of Haalilio by the Legislature, that it should go to the King as his heir, and that the King should give Haalilio's mother $20 per month during her life.

I refer to these newspaper accounts, in default of the records themselves which Counsel after search were unable to find.

The Polynesian of June 21st, 1845, in an obituary notice of the deceased Premier, says that "she had a large amount of property in her hands, the most of which she held as guardian for her neice, Victoria Kamehamalu. Her own estate, however, was considerable, the whole of which she bequeathed to her son."

But the Land Commission was authorized by law to "investigate, confirm or reject all claims to land arising previously to the 10th day of December, 1845," and as the will in this case vested the property at the date of the death of the testator, (the 7th of June, 1845) the action of this Commission in awarding the lands as mentioned above without the entail to the survivors, is conclusive against the right to prove a will *now* which would divert the property differently than awarded.

Their action was a judgment of a Court of competent authority, upon a matter within its jurisdiction, it being a "claim for land arising previously to December 10th, 1845." Kanaina vs. Long, 1872; Kahoomana vs. Minister of Interior, 1875.

But the case of the will of Kanio, 1858, is referred to by the counsel for the petitioner. In this case Justice Robertson admitted a verbal will to probate, made in 1843, and although the land the testator had, had been awarded to Kinimaka and not to the devisee. I cannot believe that the attention of the learned justice was called to this point, or he would not have thus practically set aside an award of the Land Commission of which Board he was a member.

For the foregoing reasons, my judgment is that the will of Kekauluohi, as propounded in the petition, be refused probate.

A. Francis Judd,
Justice Supreme Court.

W. C. Jones for petitioner, E. Preston for contestant.

Honolulu, March 31st 1876.

Supreme Court—In Equity.

J. KOII UNAUNA, ADMINISTRATOR OF THE ESTATE OF W. H. KAAUWAI, vs. GOODALE ARMSTRONG.

I have well considered all the allegations and proofs in this case, and do not doubt that all necessary formulas were complied with at and before the sale; it seems to me evident, that the administrator offered and was understood to offer all the right, title and interest of the deceased in, and to the lots in Papohaku, described in Royal patent 5531, and that the cry that they were under lease to this defendant was meant and understood to mean as a warning of the lease, so that the buyer might be apprised that he could not have immediate possession of them, and certainly such an announcement could work no wrong to this defendant.

At the trial, I asked several times whether the defendant was not in the possession of the Apanas marked 2, 3, and 4, on the survey, and got no answer, or an answer to the effect that he did not know, or could not tell; but the lease, or rather *a* lease from the deceased to this defendant, is shown to indicate what the defendant was in possession of. This lease does not recite the Apanas 2, 3, and 4, so that I will take it as proved by the defendant that he had only possession of Apana 5, in Papohaku, and on the assumption that he had only that Apana, and that he understood himself to be bidding on that which he had possession of only, my judgment is that the plaintiff prepare and tender to the defendant a deed of the Apana 5, in the Royal patent which is Apana 4, in the poster offered in evidence in this case. This Apana contains, according to the Land Commission survey, 14.36 acres, and that the deed be prepared according to the metes and boundaries set forth in the Land Commission survey, as set forth in the said Royal patent, and that the defendant do pay to the plaintiff for the said land, at the rate of one hundred and ninety-five dollars per acre, deducting the area taken for the road which I find to be, by the computation of Mr. Curtis J. Lyons, .60 of an acre, to wit.:—for 13.76 acres, at $195 per acre, is $2683.20, and I further adjudge that the defendant pay the costs of the case, but that the cost of the charts prepared by Mr. Bailey and Mr. Alexander be borne by the estate.

Chas. C. Harris,
Associate Justice of the Supreme Court.

E. Preston for complainant, W. C. Jones and A. S. Hartwell for defendants.

Honolulu, March 30 1876.

India.

The American Cyclopædia gives this interesting item about education in India: "A well-graded system of education, providing instruction for all classes, has been in process of organization and development in India since 1854. There are three universities at Calcutta, Madras, and Bombay, respectively. With each of these is affiliated a certain number of colleges, which fit the university undergraduates for the higher examinations; and next below in the scale are the high schools, where students are prepared to enter the university. These institutions complete the scheme for the education of the wealthier classes. After them come the middle schools, where the course of instruction is intermediate, between that of the primary and the high schools. Elementary education is afforded by the primary or village schools, of which the several provinces contain 37,544, there being 9,701 in receipt of government aid. Of colleges, there are twenty-eight in Bengal, seven in the Northwest Provinces, one in Oude, three in Punjaub, thirteen in Madras, and eight in Bombay. The total number of high schools is 349, of middle schools, 3,096, of female schools, 2011, and of normal schools, 132. The professional schools comprise civil-engineering colleges at Roorkee, Calcutta, Madras and Poonah; medical colleges at Bombay, Madras, Lahore and Calcutta; and schools of design and decorative art at Calcutta and Madras."

From the Washington Cor. Sac. Union

The Hawaiian Reciprocity Treaty—The Bill to Give it Effect—The Free List of Hawaiian Products.

You are aware that January 30, 1875, a treaty of commercial reciprocity—to last seven years, and until a year after notice of withdrawal—was concluded between the United States and the Hawaiian Islands, the ratification of which was advised by the Senate, March 18th, which was ratified accordingly by the President, May 31st, ratified by the King April 17th, ratifications exchanged at Washington, June 3d, and the treaty proclaimed on the same day. As this treaty abolishes duties on certain enumerated articles, an Act of Congress is necessary to give it effect, and the proposition must originate in the House of Representatives. Accordingly the Committee on Ways and Means have made a favorable report upon and submitted to the House a bill on the subject—introduced by Luttrel—which provides:

That whenever the President of the United States shall receive satisfactory evidence that the Legislature of the Hawaiian Islands have passed laws on their part to give full effect to the provisions of the Convention between the United States and his Majesty the King of the Hawaiian Islands, signed on the 13th day of January, 1875, he is authorized to issue his proclamation declaring that he has such evidence; and thereupon, from the date of such proclamation, the following articles, being the growth and manufacture or produce of the Hawaiian Islands, to wit: arrowroot, castor oil, bananas, nuts, vegetables, dried and undried, preserved and unpreserved, hides and skins, undressed, rice, pulu, seeds, plants, shrubs or trees, muscovado, brown and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands, and now known in the markets of San Francisco and Portland as "Sandwich Island sugar," syrups of sugar cane, melado and molasses, tallow, shall be introduced into the United States free of duty so long as the said convention shall remain in force.

The committee gives the figures to show that already there is a large trade between the Islands and Australian and New Zealand ports, which latter are struggling for a monopoly of the sugar trade with Hawaii, now that the sugar supply of the Mauritius is rapidly declining. The British Government and people are ever on the alert to increase their commercial advantages; and in the absence of the commercial relations under this treaty the United States may loose its trade with the Islands, and from the necessities of the case, must make a commercial treaty with some country. Under this treaty the United States will have the carrying trade, as the Islanders have no large vessels.

The treaty provides that "no export duty or charges shall be imposed" by either Government on the articles enumerated above. And "it is agreed on the part of His Hawaiian Majesty," says the treaty, "that so long as this treaty shall remain in force, he will not lease or otherwise dispose of or create a lien upon any port, or other territory in his dominion, or grant any special rights of use therein, to any other power, State or Government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States.

It is upon this clause that the committee lay the greatest stress. It makes the United States the favored nation to the exclusion by discriminating duties of all others—not commercially only, but politically as well. "The geographical position of the Hawaiian Islands," says the committee, "their relation to our Pacific coast and to the countries adjacent to the Pacific ocean, their history, area, and capabilities of production, the character of their harbors and their commerce, the present and future commerce of the ocean which surrounds them, the problem as to their future political status, together with the certainty that they cannot maintain autonomy or hold their place as a separate nation and not become absorbed by some other power, are to be considered in determining the question as to the policy of making this treaty."

For over 35 years the importance of these islands geographically and politically has been apparent to our Government. Webster when Secretary of State, declared that the Government of the United States would look with displeasure upon any effort by any other Government to acquire any preponderating influence over these islands, and as to the intimation that the French contemplated taking possession of them, he trusted they would not, "but they would be dislodged if it took the whole power of this Government to do it—if his advice were taken." Marcy and Seward contemplated the possibility of such a treaty as this with favor—as did many others of the leading statesmen of the country, and many administrations. The Oregon Legislature, the San Francisco Chamber of Commerce, and the Boston Board of Trade, ditto. The committee quote from Sewards' speech, Jarvis' history, the admissions of the London *Times*, the writings of Sir George Simpson, Admiral Porter, Admiral Reynolds, General Schofield and even from a recent "Speech from the throne," to show the importance of these islands to us. From these various sources it appears, in brief, that the Pacific ocean, its shores, its islands, and the vast region beyond is to become "the chief theatre of events in the world's great hereafter;" that the commerce between the Pacific States with Asia and Australia will ere long become enormous; "that the maritime power which holds Pearl river harbor, and moves her fleet there, holds also the key of the North Pacific;" that if the British could secure control of the Islands, "the British Navy could draw a line from British Columbia to Australia, completely held against our nation, and the Pacific Coast States would be defenceless;" that the recent acquisition by Great Britain of the 225 Fiji Islands, has "given important maritime advantages" to the British fleets in the Pacific—and the Hawaiian islands constitute "the only interruption to the chief control" by the British of those waters. The committee declare emphatically that:

The Pacific ocean is an American ocean, destined to hold a far higher place in the future history of the world than the Atlantic. It is the future great highway between ourselves and the hundreds of millions of Asiatics who look to us for commerce, civilization, and Christianity. The islands rest between us and them as the necessary post provided by the Great Ruler of the universe, as points of observation, rest, supply, military strategy and command, to enable each other to unite in protecting both hemispheres from European assault, aggression and avarice.

Kelley of Pennsylvania, will fight the bill tooth and nail in the House, and, judging from the previous opposition to the treaty in the Senate—where he was beaten by 51 to 12—Senator Booth will anthgonize it in the latter body. But there is not a doubt that the bill will pass both houses.

Capitol.